2006

State of Utah v. Denny Lee Moore : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DENNY LEE MOORE,	:	Case No. 20061147-CA
Defendant/Appellant.	:	*Appellant is not incarcerated.*

BRIEF OF APPELLANT

Appeal from a judgment of conviction of reckless possession of an incendiary device, a second degree felony offense under Utah Code Ann. § 76-10-306 (2003), entered in the Third Judicial District Court, West Jordan Department, in and for Salt Lake County, State of Utah, the Honorable Royal I Hansen, presiding.

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2002). Appellant Denny Lee Moore was convicted of reckless possession of an incendiary device, a second degree felony offense under Utah Code Ann. § 76-10-306 (2003). The judgment is attached as Addendum A.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Whether the trial court erred when it failed to declare a mistrial after the prosecutor made repeated references to irrelevant matters, including the dangers of explosives to children and neighbors and in the hands of terrorists.

Standard of Review: "The trial court's rulings on whether the prosecutor's conduct merits a mistrial will not be overturned absent an abuse of discretion." State v. Fixel, 945 P.2d 149, 151 (Utah Ct. App. 1997) (quotations and citation omitted); see also Chapman v. Uintah County, 2003 UT App 383, ¶28, 81 P.3d 761 (applying abuse-of-discretion standard to issue of relevance) (cite omitted).

PRESERVATION OF ARGUMENT

The issue on appeal was preserved in the record at 199:38, 52, 105-06, 202-03, 220, 223-24.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following rules are pertinent to the issue on appeal and attached hereto as Addendum B: Utah R. Evid. 401 and 402 (2006).

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, Disposition in the Court Below

On July 28, 2004, the state filed an information against Moore for one count of possession of an incendiary device. (R. 1-2). On March 9, 2006, the court conducted a preliminary hearing and bound the case over for trial. (R. 70-71).

On August 17, 2006, the court presided over a jury trial in the case. (See R. 199). At the conclusion of trial, the jury found Moore guilty as charged. (R. 162). On December 11, 2006, the trial court sentenced Moore to a suspended prison term and ordered probation for 36 months. (R. 185-88). On December 15, 2006, Moore filed a notice of appeal. (R. 189). The appeal is timely. Utah R. App. P. 3 & 4 (2006). Moore is not incarcerated.

STATEMENT OF FACTS

The state presented the following evidence at trial. On July 14, 2004, two agents, Officers Olive and Jones-Williams, went to Denny Moore's house after receiving information from Ronald McGuffee and Angela Moore that Moore was in possession of dynamite. (R. 199:32, 34, 68). They went to the door, and when Moore answered, they

asked, "Do you have any dynamite in the house." (R. 199:36, 86). Moore said he did. (Id.) The officers asked Moore to show the dynamite to them. (R. 199:39). Moore led them to a cellar in the backyard and said, "It looks like someone broke into it." (R. 199:39-40, 87).

The door was unlocked so the officers and Moore went into the cellar. It was dark. (R. 199:40). Jones had a flashlight. (R. 199:40-41). Moore indicated to an empty spot on the cellar floor and said, "Well, this is where the dynamite was." (R. 199:41). Nothing was there. (R. 199:41). One of the officers then noticed a box on the ground and they requested permission to look inside. (R. 199:41, 89). Moore gave permission. (R. 199:41, 89). Olive borrowed some latex gloves and reached into the box and felt a stick of soft-gel dynamite. (R. 199:42-43). Olive asked, "What is this?" Moore acknowledged "that it was dynamite." (R. 199:43). Olive asked, "Well, where is the rest?" Moore did not have a clear answer. He said "maybe 'some people had taken it.'" (R. 199:43).

There were two sticks of dynamite. (R. 199:47; see also 199:102, State's Exhibits 1, 3). Olive testified that the sticks were "sweating," meaning they were emanating an explosive liquid substance onto the concrete floor. (R. 199:46, 100). The condition made the explosives more dangerous. (R. 199:100-01).

Olive also discovered "det cord – detonation cord" next to the dynamite (R. 199: 46-47, 89, 101, 103; State's Exhibits 6 and 11), and another agent found a box of "IRECO Number 8 blasting caps or detonators." (R. 199:102, 103, State's Exhibits 9 and 10).

According to Olive, when the dynamite was discovered Moore began to make "mini statements" that someone brought the dynamite to his cellar to set him up, and he distanced himself from the discovery. (R. 199:44-45). Moore stated, "I don't know [how] they got here," "I did not put it here," and he claimed that Ronald McGuffee and Angela Moore set him up. (R. 199:48).

Moore did not have a license or permit for explosive devices. (R. 199:48-49).

Officers dispatched a bomb technician investigator to the area. (R. 199:49, 97; see also 199:49, 91 (indicating that an area around the house was cleared)). Investigator Montmorency testified that he transported the explosives to the Salt Lake County firearms range in Parley's Canyon where bunkers are located for the sheriff's office. (R. 199:104). Some of the explosives were tested and detonated there. (R. 199:107-08). Montmorency testified that the dynamite, detonation cord, and the blasting caps detonated with "force and fire." (R. 199:108). "They all initiated as expected." (R. 199:108). The remaining items were locked and secured in a bunker. (R. 199:109).

Detective Bybee also assisted with the investigation. She interrogated Moore at the Sandy Police Department. (R. 199:118-19). Moore told Bybee that someone broke into the cellar a week earlier. (R. 199:122). Also, he claimed his ex-wife may have framed him with the recent explosives in the cellar. He stated that people "were wanting" to frame him. (R. 199:123, 130).

Moore denied telling Olive that he had dynamite (R. 199:125). Moore told Bybee that he knew what dynamite was. (R. 199:126). He had belonged to a communications

unit for nuclear artillery in the military. (R. 199:137). Moore described finding dynamite near Utah Lake, marking it, and alerting authorities. (R. 199:126).

After the state presented its case in chief, Moore presented evidence in his defense. He called Kelly Alvey to testify. (R. 199:145). Alvey is in the lumber, building, and hardware business and he also does mining and oil exploration. (Id.) He is licensed to use dynamite, and has used dynamite, blasting caps, and det cord in his businesses. (R. 199:146-47).

Alvey testified that in 2004, he occasionally supplied building materials to Moore. (R. 199:151). In approximately July 2004, Alvey was transporting an unmarked box of dynamite on a truck that included materials for Moore. Alvey later became aware that someone had inadvertently unloaded the box of dynamite at Moore's house while unloading the materials. (R. 199:152-54). The dynamite belonged to Alvey and he did not intend to deliver it to Moore: that was a mistake. Alvey planned to go to Moore's house to pick up the explosives. (R. 199:155).

Alvey identified State's Exhibits 1 and 7, which depicted the dynamite and unmarked box. He stated they were his. (R. 199:155-58). He did not recognize the det cord or box of blasting caps, although he testified he may have had caps on his vehicle on the day in July 2004 when he inadvertently left the box at Moore's house. (R. 199:156, 159-60; see also R. 199:167-68). Alvey testified there are various stages for dynamite to sweat. (R. 199:166). He denied that he would transport sweating dynamite, but could not say for sure that the dynamite here was not his; that is, he believed it was his dynamite. (R. 199:163, 166).

At the close of the evidence, the parties presented argument. During closing argument, the prosecutor made reference to the dangers of explosives, where "kids blow their fingers off." (R. 199:202). Also, he stated, "we don't want these devices, not only falling into children's hands, we don't want them falling into terrorists' hands either. We don't want that to happen." (R. 199: 202-203). Defense counsel objected and the trial court struck the prosecutor's statement regarding terrorists or terrorism from the record and provided a curative instruction. (R. 199:203). The prosecutor also argued that recklessness included "the risk that you'll blow something up." (R. 199:220).

After argument, defense counsel made a motion outside the jury's presence for a mistrial. (R. 199:223-24). He argued that the terrorism comment and the prosecutor's references to the dangers posed to children improperly inflamed the jury's passions against the defense, running the risk that the jury would convict based on fear and danger. (Id.) The trial court denied the motion. (R. 199:225-26 (see Addendum C, hereto)). The jury convicted as charged. (R. 199:229). The court ordered Moore to a suspended prison term and placed him on probation for 36 months. (R. 185-88). Moore is not incarcerated.

SUMMARY OF THE ARGUMENT

Over defense counsel's objections, the prosecutor asked questions and made statements at trial that went to the dangers of an incendiary device. The questions focused on issues such as children and explosives, improper storage of explosives, and explosives and terrorists. The prosecutor's tactics violated rules 401 and 402, Utah Rules of Evidence. Specifically, the prosecutor sought to inject irrelevant information into the trial to inflame the jury and to cause the jury to convict out of fear. The evidence had no

bearing on any element of the charged offense, and it did not make the fact that Moore denied illegal possession of explosives more or less probable. The evidence was inadmissible, it prejudiced Moore, and it denied him a fair trial in the matter. Moore respectfully requests that this Court reverse the conviction in this case and remand the case for a new trial, excluding the inadmissible evidence and references.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT FAILED TO DECLARE A MISTRIAL AFTER THE PROSECUTOR MADE REPEATED REFERENCES TO IRRELEVANT MATTERS REGARDING THE DANGERS OF EXPLOSIVES.

A. THE RULES AND CASE LAW PROHIBIT THE PROSECUTION FROM MAKING REFERENCE TO IRRELEVANT AND INFLAMMATORY MATTERS AT TRIAL.

Rules 401 and 402 of the Utah Rules of Evidence.

Rule 401, Utah Rules of Evidence, provides that "relevant evidence" is that which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401 (2006); see also State v. Martin, 2002 UT 34, ¶31, 44 P.3d 805. "Evidence which is not relevant is not admissible." Utah R. Evid. 402 (2002); see also id. at 403 (although relevant, evidence may be excluded if it is unduly prejudicial or will mislead the jury).

"[T]he standard for determining the relevancy of the evidence is 'very low,' and even evidence with the '"slightest probative value"' is relevant." Martin, 2002 UT 34, ¶34 (quoting State v. Jaeger, 1999 UT 1, ¶¶12 & 16, 973 P.2d 404 (quoting Edward L.

Kimball & Ronald N. Boyce, Utah Evidence Law 4-2 (1996))). However, where evidence "has no probative value to a fact at issue, it is irrelevant and inadmissible under rule 402." Jaeger, 1999 UT 1, ¶13; Utah R. Evid. 402; State v. Smedley, 2003 UT App 79, ¶15, 67 P.3d 1005.

In State v. Allen, 2005 UT 11, 108 P.3d 730, the Utah Supreme Court considered whether evidence – showing that defendant had made fraudulent credit card purchases both before and after his wife's murder – would be relevant to the state's conspiracy theory in a case against the defendant for aggravated murder and conspiracy to commit aggravated murder. Id. at ¶¶22-23. The court concluded it was. It stated,

> [T]he evidence of how [defendant] concealed his payments to [a co-defendant] corroborated [the co-defendant's] account of the events and therefore ultimately supported the State's allegation that [defendant] had conspired with Taylor and [the co-defendant] to murder his wife. The evidence of [defendant's] fraudulent purchases made the existence of a conspiracy and the actions taken in furtherance thereof more probable than if the evidence were not admitted.

Id. at ¶23. The evidence went to the elements of the offense for conspiracy. See also State v. Decorso, 1999 UT 57, ¶22, 993 P.2d 837 (stating that unless the evidence at issue "tends to prove some fact that is material to the crime charged . . . it is irrelevant and should be excluded" pursuant to Rule 402); State v. Rees, 2004 UT App 51, ¶4, 88 P.3d 359 (determining that evidence essential to proving intent is relevant); State v. McDonald, 2005 UT App 86, ¶12, 110 P.3d 149 (stating that evidence going to state of mind constitutes "a defining element of the crimes charged, and is clearly relevant").

As more fully set forth below, the prosecutor made reference to irrelevant matters here. That was improper under Rules 401 and 402. (See infra, Argument B, herein).

The Law Concerning Mistrials for Prosecutorial Misconduct.

A trial court has discretion to grant a mistrial or a new trial, and an appellate court will not disturb the trial court's ruling unless it appears that the trial court has abused its discretion to the prejudice of the defendant. See State v. Harmon, 956 P.2d 262, 265-66, 276 (Utah 1998); see also State v. Smith, 776 P.2d 929, 931 (Utah Ct. App. 1989); Utah R. Crim. P. 24(a) (2006) (stating that a defendant may be entitled to a new trial "if there is any error or impropriety which had a substantial adverse effect upon the rights of a party").

In determining whether a defendant may be entitled to a mistrial or a new trial due to prosecutorial misconduct, Utah appellate courts have applied a two-part test. The test examines the following:

> [1] [whether t]he actions or remarks of [the prosecutor] call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, [2] if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result."

State v. Basta, 966 P.2d 260, 268 (Utah Ct. App. 1998) (cite omitted); State v. Reed, 2000 UT 68, ¶18, 8 P.3d 1025; State v. Troy, 688 P.2d 483, 486 (Utah 1984); see also State v. Palmer, 860 P.2d 339, 344 (Utah Ct. App. 1993) ("A comment by a prosecutor during closing argument that the jury consider matters outside the evidence is prosecutorial misconduct").

The first step is met when the prosecutor references matters meant to invoke the sympathies, passions and fears of the jury and when the prosecutor misstates application of the law to the facts. See ABA Stds for Crim. Justice: Prosecution Function and

Defense Function, §§ 3-5.8 to 3-5.9 (3d ed. 1993). Specifically, a prosecutor is prohibited from using argument calculated to inflame the passions or prejudices of the jury. See ABA Stds Crim. Justice: Prosecution Function and Defense Function, § 3-5.8(c). A prosecutor is prohibited from asking jurors to inject themselves into the case. See Com. v. Cherry, 378 A.2d 800, 803 (Pa. 1977) (counsel may not make statements appealing to the emotions of the jury); see also State v. Leon, 945 P.2d 1290, 1293 (Ariz. 1997) (stating that a prosecutor's comments must be "based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence"). A prosecutor is "precluded from arguing matters not in evidence." See State v. Hopkins, 782 P.2d 475, 478 (Utah 1989); Palmer, 860 P.2d at 344.

Indeed, a prosecutor's obligation is to present the relevant facts, and to ensure justice:

> [T]he [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. U.S., 295 U.S. 78, 88 (1935). Also,

> [a] criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence[.]

Johns v. State, 832 So.2d 959, 963 (Fla. Ct. App. 2002) (cite omitted); ABA Stds for Crim. Justice Prosecution Function and Defense Function, § 3-5.8(d) (a prosecutor may not "divert the jury from its duty to decide the case on the evidence"). Thus, "[s]tatements which suggest that a jury has an obligation to convict a defendant on some basis other than solely on the evidence before it are improper and beyond the broad latitude allowed in closing argument." State v. Andreason, 718 P.2d 400, 402 (Utah 1986).

The second part of the prosecutorial-misconduct test refers to the prejudice analysis. See State v. Span, 819 P.2d 329, 335 (Utah 1991). When a prosecutor makes comments to incite the jurors' passions, prejudices, and sympathies, those comments have a substantial impact on a defendant's case, resulting in prejudice. The comments introduce irrelevant and irrational information into the decision making process.

"[W]here evidence [is] shown to have supported only conjectural inferences which had little probative value, or where no evidence was adduced that showed that a fact had any causal connection with the [crime charged], reversal may be appropriate on grounds that the improperly admitted evidence could only have served to confuse and mislead the jury or to prejudice the outcome of the case." State v. DeAlo, 748 P.2d 194, 199 (Utah Ct. App. 1987) (cite omitted; internal quotations omitted).

This Court will reverse a conviction based on the prosecutor's injection of improper matters at trial "[i]f the prejudice is such that there is a reasonable likelihood the jury would have reached a more favorable result absent the comments." Reed, 2000 UT 68, ¶18 (cite omitted); State v. Pearson, 943 P.2d 1347, 1352 (Utah 1997); see also

Troy, 688 P.2d at 486 ("If proof of a defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial.") (cite omitted).

Pursuant to Rules 401 and 402 and case law, the prosecutor's references at trial to irrelevant and inflammatory matters were improper, as further explained below. See infra, Argument B., herein. Also, the references were prejudicial. See infra, Argument C, herein.

B. THE PROSECUTOR MADE IMPROPER COMMENTS AND REFERENCES AT TRIAL.

In this case, the prosecutor injected irrelevant information into the trial. Specifically, the prosecutor made references to children (see R. 199: 38, 52; see also 199: 165), and the dangers of explosives (R. 199:160 (referencing "kids" "getting their fingers blown off by blasting caps"), 165). He asked Officer Olive to state how many children were around the house when officers discovered dynamite, and he inquired into their ages. (R. 199:38 (there were three children, ages four to six, approximately)). The statements were intended to suggest that possessing explosives is dangerous to children. (See R. 199:52). Also, the prosecutor made references to the government's safe storage of explosives, thereby insinuating that safe storage – or lack thereof – is somehow relevant to the possession charge. (See R. 199:105-06, 113; see also 199:164).

While the defense stipulated that items discovered in Moore's cellar were not stored in compliance with state or federal law (R. 199:106), the prosecutor's references went beyond that stipulation to suggest dangerous conditions and to create a sense of fear in the jury beyond the charge for simple possession. (See R. 199:105-06, 113).

After the parties presented evidence to the jury, the prosecutor made further references in closing argument to "kids blow[ing] their fingers off" and explosives "falling into children's hands" and "falling into terrorists' hands." (R. 199:202; see also 199:220 (suggesting that recklessness does not go to possession, but rather goes to the risk that "you'll blow something up")). Again, the several statements and insinuations were intended to create fear in the minds of jurors, to inflame their passions, and to cause them to convict out of fear for terrorists or explosives harming children or neighborhoods. (See R. 199:223-24). The prosecutor's comments and references were not relevant to the possession charge.

To explain, for the offense of possession, the prosecutor was required to prove that Moore "knowingly, intentionally, or recklessly possesse[d] or control[led] an explosive, chemical, or incendiary device," including "dynamite," "detcord," or "blasting caps." Utah Code Ann. § 76-10-306(1)(a)(i), (3) (2003). The elements for the offense are straightforward. They include (i) a mental state, (ii) possession, and (iii) an explosive device. Id.

To that end, the element of "recklessly" goes to the mental state for the defendant. Id. Where the prosecutor was required to prove one of three mental states (recklessly, knowingly or intentionally), the jury had to decide whether Moore intentionally or knowingly possessed explosives; or whether he was subjectively aware of such possession but consciously disregarded it for the reckless mental state. See State v. Robinson, 2003 UT App 1, ¶6 & n.2, 63 P.3d 105 (for a reckless mental state, "the determination to be made is whether the defendant was subjectively 'aware of but

consciously disregarded' the risk his actions posed") (cite omitted); State v. Martinez, 2000 UT App 320, ¶12 n.5, 14 P.3d 114 ("Liability for criminal recklessness . . . require[s] actual knowledge or awareness and thus turns on the defendant's subjective mental state") (internal citations omitted), aff'd, 2002 UT 80, 52 P.3d 1276; State v. Singer, 815 P.2d 1303, 1308-09 (Utah Ct. App. 1991).

However, in this case, the prosecutor seemed to believe that "recklessly" should be used in a different sense, *i.e.*, to show that it is reckless to have explosives around children, available to terrorists, or improperly stored. (See R. 199:38, 52, 105-06, 160-61, 164-65, 202-03, 220); see also Utah Code Ann. § 76-5-112(1) (2003) (defining misdemeanor "reckless endangerment" as requiring proof that defendant recklessly engaged in conduct that created "a substantial risk of death or serious bodily injury to another person").

That is nonsensical for the possession offense at issue here. Under the prosecutor's interpretation, even a wholesaler or licensed distributor of explosives would be in "reckless[]" criminal possession if children were in the vicinity or if he sold explosives to an individual with devious intentions. Yet those facts do not relate to elements of the offense. The term "recklessly" in Section 76-10-306 does not go to the safe-keeping or the hazardous conditions of the explosives. It goes to the defendant's mental state, i.e., whether defendant was aware, but disregarded, that he possessed explosives. Utah Code Ann. § 76-10-306(3).

In short, the prosecutor misunderstood the elements for the offense and made repeated references to irrelevant matters, *i.e.*, the reckless storage of and access to the

explosives. Evidence that explosives were dangerous around children, neighborhoods and terrorists did not relate to proving the elements for actual possession. The evidence did not go to the existence of any fact pertinent to the elements and it did not make "possession" of explosives more or less probable. The references and evidence were irrelevant to the offense. See Jaeger, 1999 UT 1, ¶13; Utah R. Evid. 402.

They were meant to invoke the sympathies, passions and fears of the jury and to confuse the jury as to what the elements were. See Palmer, 860 P.2d at 344 ("A comment by a prosecutor during closing argument that the jury consider matters outside the evidence is prosecutorial misconduct"); (see also, supra, pages 9-12).

That was improper and inadmissible. See ABA Stds Crim. Justice: Prosecution Function and Defense Function, § 3-5.8(c), (d) (stating a prosecutor is prohibited from making certain improper arguments to the jury); Cherry, 378 A.2d at 803 (counsel may not make statements appealing to the emotions of the jury).

C. THE IMPROPER REFERENCES AND COMMENTS WERE PREJUDICIAL.

Preservation

Although defendant did not object to each improper reference that the prosecutor made during witness examinations at trial (see R. 199:160-61, 164, 165), the motion for a mistrial at the end of trial was sufficient to take into account the prosecutor's repeated indiscretions. (See R. 199:223-24 (objecting to the cumulative references)). Indeed, the defense made a motion for a mistrial due to the cumulative effect of the prosecutorial misconduct. (R. 199:223-24).

Once the defendant made the motion, the prosecutor and the trial court addressed

the merits of defendant's claims and treated them as timely. (See R. 199:225 (requiring a response from the prosecutor); 199:225-26 (ruling on the merits of the cumulative matters and not finding waiver)); see also State v. Belgard, 830 P.2d 264, 265-66 (Utah 1992) (ruling that whatever the requirements of the rule, a trial judge may choose not to address timeliness and may proceed to consider the merits of a claim, thereby supporting preservation) (citing State v. Matsamas, 808 P.2d 1048 (Utah 1991)); State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991) (stating if the trial court has addressed the merits, a waiver or timeliness argument is weakened); State v. Johnson, 856 P.2d 1064, 1067 (Utah 1993) (stating the trial court must rule on an issue before it can be raised on appeal), superseded on other grounds as recognized in State v. Hammond, 2001 UT 92, ¶20, 34 P.3d 773.

The trial court denied the motion for a mistrial. (See R. 199:266, Addendum C, hereto). Thus, the cumulative effect of the errors may be assessed on appeal.

The Curative Instruction

Also, where the trial court provided a curative instruction after the prosecutor made improper references in closing argument (R. 199:203), that is not a cure-all. The Utah Supreme Court has ruled that curative instructions "are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial." State v. Harmon, 956 P.2d 262, 271 (Utah 1998); see also State v. Longshaw, 961 P.2d 925, 929-30 (Utah Ct. App. 1998). The supreme court also has recognized that curative instructions "are not always sufficient to avoid the potential prejudice to the defendant. [State v. Auble, 754 P.2d 935, 937 (Utah 1988)]. The potential for prejudice is greatest when the circumstantial facts are closely related to the

issue the jury must ultimately decide." State v. Wetzel, 868 P.2d 64, 69 (Utah 1993). "This court acknowledges that curative instructions are not without defect or limitation." Harmon, 956 P.2d at 273 n.9; see also id. at 278 (Durham, J., concurring) (it is significantly likely that "our collective confidence in the curative instruction as a valuable 'tool' is not substantiated by reality").

In State v. Leon, 945 P.2d 1290 (Ariz. 1997), defendant was charged with and convicted of drug distribution. On appeal, defendant argued prosecutorial misconduct, where the prosecutor attempted to place the prestige of the government behind his case, and he made references during closing arguments to police reports not in evidence. Id. at 1291-92. The defendant objected to the improper statements, and the trial judge sustained the objections to statements in closing argument, reprimanded the prosecutor, and provided a curative instruction to the jury. Id. at 1292. After the jury began deliberations, the defense requested a mistrial, which the trial court denied. Id. On appeal, the Arizona Supreme Court reversed the case and stated the following:

> The [prosecuting] attorney continued to violate standards of appropriate conduct at the conclusion of the trial. Although advocates are ordinarily given wide latitude in closing argument, their comments must still be "based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence.". . . Here, nothing was admitted pertaining to previous drug transactions, which alone should have precluded the state from mentioning them in closing. . . . Similarly, by implying that police reports contained other "bad acts," the deputy county attorney referred to matters not in evidence and presumably inadmissible under Rule 404, Ariz.R.Evid. This misconduct was particularly egregious considering that the court had earlier excluded statements regarding a prior incident because they had not been formally disclosed in advance of trial.

Id. at 1293 (internal cites omitted). The court remanded the case for a new trial. Id. at 1264.

In this case, after the prosecutor made reference in closing argument to children and explosives and explosives falling into "terrorists' hands," defense counsel objected and the trial court instructed the jury not to consider the terrorism references in deliberations. (R. 199:202-03). The court specifically considered the prosecutor's statement going to terrorism to be inappropriate. (See R. 199:225-26). However, at that point, the prosecutor had planted the seed, and the damage was done. Any confidence that the curative instruction fixed the problem "is not substantiated by reality." Harmon, 956 P.2d at 278 (Durham, J., concurring). Since the law recognizes that a curative instruction is not a cure-all, see id. at 273, the analysis here does not end with the curative instruction. This Court may assess prejudice. See e.g., id. at 273 (recognizing that error may be assessed for prejudice).

Prejudice

"If the prejudice is such that there is a reasonable likelihood the jury would have reached a more favorable result absent the comments, we will reverse." State v. Pearson, 943 P.2d 1347, 1352 (Utah 1997). When the prosecutor uses improper references and arguments to incite the jurors' passions, prejudices and sympathies, the improper matters have a substantial impact on a defendant's case. The argument introduces irrelevant and irrational information into the decision making process. See Andreason, 718 P.2d at 402 (stating that improper references are "beyond the broad latitude allowed in closing argument").

Given the evidence presented at trial in this case, the prejudice analysis here turns on the reasonable-doubt standard. Under the reasonable-doubt standard "[t]he [state] has the burden of proving the defendant guilty beyond a reasonable doubt." State v. Reyes, 2005 UT 33, ¶37, 116 P.3d 305. "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt." Id. The proof for a criminal conviction must be powerful. [1]

In this case, the evidence going to the elements raised doubt about guilt. Specifically, while the state presented evidence that Moore allowed officers to enter and search his cellar and discover explosives (see R. 199:36-39, 86-87), there is also evidence that Moore believed he was showing officers explosives that belonged to Alvey. (R. 199:41 (indicating Moore believed explosives were in a different place in the cellar), 43 (indicating Moore thought the explosives had been taken); see also R. 199:87, 88). And there is evidence that the explosives actually discovered in the cellar were a surprise to Moore and did not belong to him. (R. 199:40 (indicating someone may have broken into the cellar), 41 (indicating Moore did not know about the explosives that were actually located

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1 Moore is not advocating for a prejudice analysis that considers whether the error is "harmless beyond a reasonable doubt." State v. Velarde, 734 P.2d 440, 444 (Utah 1986) (cite omitted). That analysis is reserved for errors that deprive a defendant of a constitutional right. See id. Also, it requires the party that benefited from the error (the prosecution) to show "beyond a reasonable doubt that the error did not contribute to the verdict (or sentence) obtained." State v. Young, 853 P.2d 327, 359, 377 (Utah 1993) (cites omitted).

Moore's analysis simply recognizes that for guilt, the state's proof must be beyond a reasonable doubt.

in the cellar), 44-45, 68, 123, 130 (indicating Moore believed others had "set him up"), 48, 90, 122).

In addition, Moore presented evidence to support that the dynamite belonged to Alvey and was inadvertently left on his property. (R. 199:152-154 (Alvey became aware that his dynamite was left at Moore's house when he delivered supplies there), 156-58, 166).

That evidence raised reasonable doubt with respect to Moore's mental state in purportedly possessing the explosives. That is, where the explosives belonged to Alvey and Alvey intended to retrieve them, Moore did not possess the explosives either recklessly, knowingly or intentionally. Also, where others may have been involved in a "set up" against Moore, Moore had no involvement in possessing explosives. Thus, absent the overlay of fear and danger injected by the prosecutor (see supra, Argument B., herein), jurors likely would have doubted Moore's guilt for reckless, knowing, or intentional possession of explosives.

Likewise, the evidence raised a reasonable doubt that Moore had constructive or actual possession of the explosives. For constructive possession, the state was required to prove that the items were under Moore's dominion and control. See State v. Fox, 709 P.2d 316, 319 (Utah 1985). "Knowledge and ability to possess" are insufficient to establish constructive possession unless the defendant intends to "make use of that knowledge and ability." Id. at 319. Also, it is not enough that Moore lived in the house, particularly where evidence also supported that others had access to the property, or that the explosives belonged to another. (See R. 199:40 (indicating someone may have

broken into the cellar), 44-45, 48, 68, 122, 123, 130 (indicating Moore believed others had "set him up"), 90, 152-154 (Alvey became aware that his dynamite was left at Moore's house when he delivered supplies there), 166); see also Fox, 709 P.2d at 319; State v. Layman, 1999 UT 79, ¶¶12-13, 985 P.2d 911 (where the facts support that the items belonged to someone else, the state must also show that defendant intended to use the items "as his own" to support constructive possession); State v. Salas, 820 P.2d 1386, 1388 (Utah Ct. App. 1991) (recognizing defendant did not have sole access to items).

In this case, the evidence was susceptible to alternative interpretations. It was sufficient to raise doubt about Moore's actual or constructive possession of the items. There is a greater likelihood that the jury was improperly influenced by the prosecutor's misleading statements and references at trial. See Troy, 688 P.2d at 486-87 (finding that the prosecutorial misconduct likely influenced the jury). The prosecutor's tactics in misleading the jury should not be reinforced with a finding of harmless error. The error was prejudicial requiring reversal.

CONCLUSION

The issues in this case may be readily resolved under established Utah law. See Utah R. App. P. 29(a)(3). Moore respectfully requests that this Court reverse the conviction for a new trial.

SUBMITTED this 25th day of May, 2007.

Linda M. Jones
Stephen Howard
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 25TH day of May, 2007.

Linda M Jones
LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this __ day of _____, 2007.

Tab A

THIRD DISTRICT COURT, STATE OF UTAH

Salt Lake County, West Jordan Department
8080 South Redwood Road, West Jordan, UT 84088

SENTENCE/JUDGMENT/NOTICE FORM

CITY/STATE Plaintiff
-vs-
Danny Moore
Defendant

DOB: 3/8/84

CASE NUMBER 041408410
DATE 12-11-06
JUDGE RH
CLERK MS
Plaintiff Counsel KE
Defense Counsel SH
Interpreter

CHARGES: F2 Reckless - Inlend AMENDED: dlv

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

FINE $ 1500 SUSP $ 1500 JAIL ____ SUSP ____ PRISON 1-15 STAY 1-15
FINE $ ____ SUSP $ ____ JAIL ____ SUSP ____ PRISON ____ STAY ____
FINE $ ____ SUSP $ ____ JAIL ____ SUSP ____ PRISON ____ STAY ____
FINE $ ____ SUSP $ ____ JAIL ____ SUSP ____ PRISON ____ STAY ____

RESTITUTION $ open/60days Pay to: Court • Victim • APP • Show proof to Court
fine ~~COURT COSTS~~ $ 500
ATTORNEY FEES $ 700
TOTAL DUE: $ 1200 Pay $ ____ a month: Begin: ____ End: ____ All: ____
COMMUNITY SERVICE: LIEU: Jail ____ Fine ____ Hours 150 Date Due per APP
PROBATION/TUA: MONTHS 36 APP X SLPS ____ COURT ____ OTHER ____

TERMS OF PROBATION/TUA:

- ☒ NO FURTHER VIOLATIONS
- ☒ TIMELY PAYMENTS
- ☒ NO DRUGS ~~OR ALCOHOL~~
- ☒ RANDOM UA/DT per APP
- ☐ NOT FREQUENT PERSONS PLACES WITH DRUGS/ALC
- ☒ SUBMIT TO SEARCH
- ☐ DRUG/ALCOHOL EVAL/COMPLY
- ☐ ANTABUSE
- ☐ DRUG COURT
- ☐ COMPLETE CATS
- ☐ COMPLETE CATS AFTERCARE
- ☐ COGNITIVE RESTRUCTURING
- ☐ RESEARCH PAPER ON DRUGS
- ☐ AA/NA MEETINGS
- ☐ FULLTIME EMPLOY/EDUCATION
- ☐ GED/HIGH SCHOOL DIPLOMA
- ☐ IN/OUT TREATMENT ____
- ☐ COUNSELING ____
- ☒ MENTAL HEALTH EVALUATION - comply
- ☐ VOCATIONAL REHAB
- ☐ INTERLOCK with 30 days
- ☐ DUI CLASS ____
- ☐ COMPLETE ODYSSEY HOUSE
- ☐ COMPLETE FIRST STEP HOUSE
- ☒ Curfew Electr monitor ☒ Wkgn. rest per APP
- ☐ NO DRIVING
- ☐ NOT TO DRIVE UNLESS INSUR, REG, AND DL ARE VALID
- ☐ NO CONTACT WITH VICTIM
- ☐ LETTER OF APOLOGY
- ☐ CHILD SUPPORT
- ☒ NO FIREARMS - Dynomit
- ☐ OTHER ____
- ☐ HEALTH TESTING ☐ DNA TESTING
- ☐ COMPLY WITH DCFS SERVICE PLAN
- ☐ SERVE ____ DAYS JAIL
- ☐ **ATTEND REV HEARING:** ____

I CERTIFY DEF RECEIVED A COPY OF THIS JUDGMENT IN COURT

(CLERK) MS DATE 12-11-06

APPEAL MUST BE FILED WITHIN
30 DAYS OF THIS SERVED JUDGMENT

District Court Judge

By ____
STAMP USED AT DIRECTION OF JUDGE

THIRD DISTRICT COURT WEST JORDAN

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 041400410 FS
DENNY LEE MOORE, Defendant.	:	Judge: ROYAL I HANSEN Date: December 11, 2006

PRESENT
Clerk: vickielc
Prosecutor: MCKINNON CRANDALL, KIMBERLY
Defendant
Defendant's Attorney(s): HOWARD, STEPHEN W

DEFENDANT INFORMATION
Date of birth: March 8, 1954
Audio
Tape Number: 06187 Tape Count: 11.12

CHARGES

1. RECKLESSNESS - INCENDIARY DEVICE - 2nd Degree Felony
- Disposition: 08/17/2006 Guilty

SENTENCE PRISON

Based on the defendant's conviction of RECKLESSNESS - INCENDIARY DEVICE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

Case No: 041400410
Date: Dec 11, 2006

SENTENCE FINE

Charge # 1 Fine:	$18500.00
Suspended:	$18000.00
Surcharge:	$243.24
Due:	$500.00
Total Fine:	$18500.00
Total Suspended:	$18000.00
Total Surcharge:	$243.24
Total Principal Due:	$500.00 Plus Interest

COMMUNITY SERVICE

Complete 150 hour(s) of community service.
Attorney Fees Amount: $700.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURER

SENTENCE TRUST NOTE

The matter of restitution is open for 60 days.

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 500.00 which includes the surcharge.
Interest may increase the final amount due.

PROBATION CONDITIONS

No other violations.
Comply with Adult Probation and Parole.
Notify the court of any address change.
Timely payments of all fines, attorney fees and restitution.
Not to possess/consume alcohol or non prescribed controlled substance.
Randon urinalysis and drug testing as requested.
Not to associate with persons or frequent places where drugs or alcohol are being used or are the chief item of sale.
Submit to search of self or property by probation agent.

Case No: 041400410
Date: Dec 11, 2006

AP&P may impose a curfew and place on electronic monitor if necessary.
Complete a mental health evaluation and comply with all requirements, Evaluation to be completed within 30 days.

Dated this 11 day of December, 2006

ROYAL I HANSEN
By District Court Judge
STAMP USED AT DIRECTION OF JUDGE

000158

Tab B

UTAH R. EVID. 401 and 402 (2006)

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Tab C

IN THE THIRD JUDICIAL DISTRICT COURT - WEST JORDAN

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	Case No. 041400410 FS
Plaintiff,	Appellate Case No. 20061147-CA
v	
DENNY LEE MOORE,	
Defendant.	With Keyword Index

JURY TRIAL AUGUST 17, 2006

BEFORE

HONORABLE ROYAL I. HANSEN

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

20061147-CA

000199

Any response from the State?

MR. CHRISTENSEN: Yes, Your Honor. As I indicated at the sidebar the Homeland Security Bill is part of what this statute is, it was enacted after 9-11. We can't operate with juries outside of a vacuum. And we do have a recklessly provision of *mens rea* which considers risk. It's not risk to be risky. It's risk of the behavior involved in this particular, inherently dangerous enterprise. I didn't say Mr. Moore was a terrorist. All I said was that the potential for these materials and the reasons why we license and control them is for obvious reasons. Terrorism being one. Children being another. Proper licensing for safety and things like that. That's all relevant argument.

And, otherwise, why even argue the law with respect to these cases because they wouldn't make any sense. We would be operating in a vacuum and I don't believe that's what the legislative intent was when they enacted these provisions, and certainly, the inferences to be drawn from why we are so concerned about these types of devices being in anybody's possession I think is highly relevant to the case.

THE COURT: Thank you.

Anything else, Mr. Howard?

MR. HOWARD: No, Your Honor.

THE COURT: Okay. You know, counsel, I felt like the statement relating to terrorist or terrorism was

inappropriate. I immediately cautioned the jury with regard to that. I struck that from the record. They were advised in the instructions that they were to disregard that, and I have the firm belief that if there was any impropriety with regard to that, that that was corrected and we did everything that was appropriate and possible under those circumstances.

Secondly, with regard to any cumulative effect, I think that Mr. Christensen, the State's entitled to make logical inferences, and I don't think that the bounds were exceeded with regard to those, and based on that I'm not going to grant a mistrial under those circumstances, but note that for the record, and I appreciate your raising the issue.

Anything else we need to address, counsel?

MR. CHRISTENSEN: Just the exhibits, Your Honor.

THE COURT: Okay. I'm going to have you, if you would, Mr. Howard and Mr. Christensen, if you'd both look at the exhibits, make sure that they're full and complete and we're in agreement as to what should go into the jury room and then we'll take those to the jury and I'll have the bailiff to do so.

UNKNOWN: (Inaudible).

THE COURT: Yeah, let's go ahead and take a look. Anything else we need to address other than the Exhibits, counsel?

MR. HOWARD: No.